FEDERATION REPORTS.

In re TAN SOH SIM, DECEASED; CHAN LAM KEONG AND 4 OTHERS v. TAN SAW KEOW AND 3 OTHERS.

[Court of Appeal (Taylor, Abbott and Briggs, JJ.) January 22, 1951]

[F. M. — Civil Appeal No. 11 of 1950]

Chinese Family Law — Recognition of Chinese Laws Order in Council (Perak) 1893 — Distribution Enactment (Cap. 71) — Contract Ordinance, s. 26(a) — Duties of administrator — Costs.

Chinese Family Law, subject to modern and local modifications, is still the personal law of Chinese domiciled in the Malay States, except where excluded by express legislation, e.g. the Distribution Enactment. Chinese adoption is still legal and effective.

Where the validity of an agreement depends on natural love and affection between near relations, relationship and nearness depend on the mores of the group to which the parties belong and the circumstances of the family concerned.

A Chinese adopted son is related to the family of his adoptive father but a son, whether natural or adopted, is not "nearly related", within the scope of the Contract Ordinance, to the family of his adoptive mother.

Principles of Chinese family law explained and applied.

Decision at first instance in Re Tan Soh Sim, deceased, (1950) M.L.J. 123, affirmed but for different reasons.

An administrator ought not to initiate litigation between the legal beneficiaries and parties claiming adversely to them.

Cases referred to:—

(1) *Sanders v. Sanders* 19 Ch. D. 373.

(2) *Stapilton v. Stapilton* 1 Atk. 1.

(3) *Choi Wai Ying v. Cheong Weng Chan and others* (1933-34) F.M.S.L.R. 191 at p. 201.

(4) *King v. Godwin* 6 Bing. 576.

APPEAL from the judgment of Thomson, J. reported at (1950) M.L.J. 123.

E. D. Shearn and *R. Ramani* for the appellants.

M. S. Mahendran for the first respondent.

H. T. Ong for the second and third respondents.

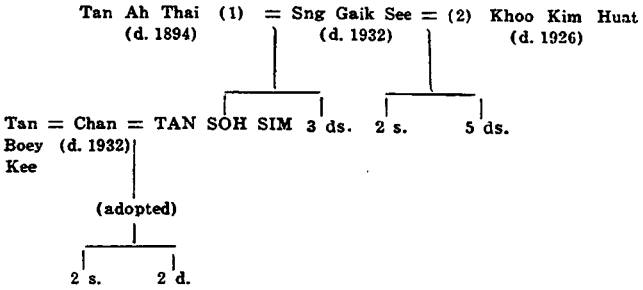
R. W. Peters for the fourth respondent (The Official Administrator, Federation of Malaya).

The facts and arguments appear sufficiently from the judgment of Taylor, J.

Cur. Adv. Vult.

Taylor, J. : — The central question in this appeal is one of interpretation of a written instrument but in order to appreciate the nature of the dispute, it is necessary to state the circumstances of the family, which were somewhat unusual.

The history of the matter begins more than fifty years ago when one Tan Ah Thai died leaving a widow and four daughters. The widow, Sng Gaik See, then married one Khoo Kim Huat; the issue of her second marriage were two sons and five daughters. Tan Soh Sim, the intestate now in question, was the eldest daughter of the first marriage; her husband was named Chan; they had no children of their own but adopted four. Chan left considerable estate and his widow was the executrix of his will; there was a secondary widow named Tan Boey Kee. The family tree was :—



It will be seen that Soh Sim left three full sisters and seven half brothers and sisters so that if her estate were divided among them equally it would fall into ten shares.

Chinese custom is essentially patriarchal in character; it is doubtful whether, in the nineties, the remarriage of a principal widow would have been regarded by her deceased husband's family, at the best, as anything less than a grave social misdemeanour. The remarriage of widows was tolerated only on the clear understanding that they forfeited all rights to maintenance; the deceased husband's family would have nothing more to do with them.

In this case, however, the daughters of Sng Gaik See's first marriage who are Tans, maintained social and friendly relations with the children of her second marriage, who are Khoos. The family setting has therefore a fundamental anomaly and presents a situation which traditional Chinese customs cannot be expected to fit.

Tan Soh Sim appears to have been a woman of strong character. She continued to live in the family house at Teluk Anson and she played the part of a generous rich aunt to her uterine sisters and nieces, the Khoos; her subordinate widow, Boey Kee, was devoted to her. This picture may be a little more highly coloured in retrospect than in contemporary

view but there is solid evidence to shew that the picture is essentially true. Unfortunately, she omitted two steps which, as it turns out, would have been in the best interests of her successors; she did not fully administer her husband's estate but retained the residue mixed with her own personal property, and she did not make a will. At the age of fifty-five she fell ill, somewhat suddenly; after a day or two all the relations and also her solicitor were summoned but by that time she was too ill to make a will. The secondary widow of Chan informed the family that Soh Sim had made an oral declaration that her testamentary intentions were to give the whole of her property to the adopted children, subject to substantial provision for herself, Tan Boey Kee. The solicitor explained to the assembled relations that in the event of Soh Sim dying intestate, operation of law would exclude all those from the distribution which would be among the ten brothers and sisters equally. Thus the result of intestacy would be totally different from the alleged intentions of Soh Sim and repugnant to the ordinary ideas of a Chinese family.

Eventually the solicitor drew up a document reading :—

"We the undersigned relatives of Tan Soh Sim do hereby renounce all claims of whatsoever nature to the assets of Tan Soh Sim should she die intestate. This renunciation of our claims is in favour of (the four adopted Chans and Boey Kee, the other widow) in manner following . . . . ."

(Summarised, the manner was)

Certain houses to Boey Kee absolutely;
Other houses to Boey Kee for life with remainder to the adopted sons;
Certain jewellery to the adopted daughters;
Residue to the adopted sons.

This instrument was signed, in effect, by the three Tan full sisters, and by all the seven Khoo half-brothers and sisters.

(Actually one sister had died and was represented by her daughters but this and certain other details, which do not affect the issues argued on the appeal, are omitted for clarity.)

Tan Soh Sim died without having recovered consciousness, so the effect of this instrument must be decided.

On its face it means that all those who, on the view of the law taken by the family solicitor, would be legally entitled to share on an intestacy, renounced everything in order to give the whole estate to parties who had no legal claim to any share.

There was another serious difficulty. Tan Soh Sim had a life interest only in the estate of Chan. It appears that Tan Boey Kee was vaguely aware that the property dealt with in the instrument included, or represented, some of the assets of Chan's estate, but separate accounts had not been kept. It was impossible to say at that date — it is indeed impossible to say even now — exactly which assets are whose because the necessary accounts have not yet been taken. It was, however, admitted at the bar that one of the houses mentioned was the family house devised by Chan's will and, inasmuch as the beneficiaries of Chan's will are not identical with the beneficiaries on the intestacy of Tan Soh Sim, the instrument by itself could never be fully effective. That, however, does not necessarily invalidate the instrument as regards any assets with which the signatories were competent to deal. In so far as they were not fully informed they were dealing with assets not more extensive than they supposed but less extensive, so that the confusion, while it might lead to practical difficulties if and when it was sought to give effect to the instrument, does not affect the question of its general validity.

Doubts having arisen among the parties after the death of Tan Soh Sim, some of the signatories executed further documents by which they ratified the arrangement set out in the instrument for valuable considerations moving to them from the donees under the instrument. The validity of these further documents is not now contested but they have a bearing on the question in this way. The instrument is challenged by some of the signatories and supported by others. It cannot be made effective, even as to such of the assets mentioned in it as are separate assets of Tan Soh Sim, unless the signatories abide by it or are held to be bound by it. Those signatories who still support it are all affected by subsequent consideration.

After various delays letters of administration of the estate of Tan Soh Sim devolved upon the Official Administrator who, manifestly, could not distribute the property while the validity of the instrument of renunciation was in dispute; he issued an originating summons praying for decision of the questions :—

Whether the instrument is valid?

If not, how is the estate to be distributed?

and certain other points.

Now the first question which any lawyer ought to ask in a case of doubtful succession is : — "Where was the deceased domiciled?" This rule is universal in the English-speaking world because both testamentary power and intestate succession to movables are governed by the law of the domicil. It is clear that Tan Soh Sim's solicitor had this principle in his mind and that he advised on the footing that the Distribution Enactment of 1930 would apply, which is plainly correct if she was domiciled in Perak, and plainly wrong, as

to movables, if she was domiciled in China. (In passing it may be remarked that if she were domiciled in one of the Settlements, or in Singapore, the rule would be substantially the same as in Perak).

The summons was heard by Thomson, J., and his judgment is reported in 16 M.L.J. at p. 123. At the hearing it was stated from the bar that Tan Soh Sim was domiciled in Perak and the whole argument was on the basis that this view was correct. The learned trial Judge dealt briefly with the evidence and found that all the parties were domiciled in Perak at the material date. On appeal this finding was challenged on the grounds that there was insufficient evidence, that the opinions of solicitors and counsel are not evidence or binding admissions, that the question of domicil was never in issue during the trial and that in the circumstances the parties ought to have an opportunity to adduce further evidence with a view to shewing that the intestate was, or may have been, domiciled in China. It is true that the opinions and assumptions of the lawyers do not bind the Court but it is not correct that the question was not in issue at the trial; it was plainly raised on the face of the summons by the second question set out above and the parties had ample opportunity to contest it and they could easily have applied for a formal issue, if necessary with pleadings, had they been so advised. Their omission to do so affords no good ground for adducing fresh evidence now — *Sanders v. Sanders*[1].

As to the evidence which was on the record, it is true that there was little relating to Chan Chee Yean, the husband of the intestate. He may have had a domicil of origin in China but he lived for many years in Perak, established a family house and died there; even if it be conceded that those facts are insufficient to establish a domicil of choice for him, and even if it be conceded, without any strong probability that he, and in consequence his wife, were domiciled in China at the time of his death in 1932, the fact remains that for the next seven years she enjoyed a very high degree of personal liberty. She had ample means and few ties. She was free to go to China or Java or to any other country which might have attracted her. But actually she remained at Teluk Anson, managing the family property, making further investments in land and houses in that neighbourhood, and causing some of the property to be settled for successive lives. This is sufficient to shew that if she were not already domiciled in Perak she acquired a domicil of choice there before her fatal illness occurred. It is true that the learned trial Judge went further and found that all the other parties were domiciled in Perak but this was not necessary to his decision. The only material domicil was that of the intestate herself and his finding as regards her is supported by the facts proved.

From this it necessarily follows that the estate of Tan Soh Sim should be distributed among the ten brothers and sisters equally, except in so far as they effectively agreed to different dispositions. The dominant question is whether the instrument of renunciation is effective. The trial Judge held that it is invalid and it is against this part of his decision that the donees appeal.

The instrument is very short but far from simple. There are two operative clauses. By the first, the signatories renounce all claims to share in the estate if an uncertain event, not in their control, should afterwards happen. The second clause names the persons who are to benefit. None of these persons signed. No consideration is expressed. The instrument is not, in form, an agreement. On its face it is an unilateral conditional undertaking to make a free gift. The condition has been fulfilled. Is the instrument binding?

Counsel for the appellants adduced several distinct arguments based on different views as to what the instrument, on its true construction, actually is.

First they said that the instrument was a mutual agreement among the signatories. If A says to B: — I will give $1,000 to Z provided that you give him $500, and B assents, this is an agreement between A and B. It cannot be enforced by Z against either A or B but if A pays his $1,000 he can compel B to pay $500. There was a general desire among the donors to give the property to the donees and unless all the beneficiaries of Tan Soh Sim's estate concurred, this desire or intention could not be carried out. In effect, all the sharers on an intestacy combined to make a will for the unconscious woman and their motive was to give effect to her wishes as recounted to them by Tan Boey Kee. There was no other way of carrying out their common desire. The promise of each was the consideration for the promise of all the others. They must have agreed in this sense because they all signed.

This, shortly, is the argument, but however sound it may be in law it is not supported by the facts. The instrument was drawn by a solicitor and if the situation at the time had been as suggested, why did he not write:

> "We, having agreed among ourselves to give our shares to (the Chans and Boey Kee) hereby renounce...."?

He filed an affidavit setting out in considerable detail the circumstances in which the instrument was drawn and signed and there is no suggestion of any mutual promises. Actually one of the Khoo sisters was not present at the family meeting and he obtained her signature the next day. If this argument were correct in fact, he ought to have said to her: — "The others have all signed on the footing that you will join in; if you do not sign it will fall through." She might or might not have signed. But unless it was explained to her in that way there could be no mutuality as regards her. The solicitor says explicitly that he explained to her the contents of the instrument and she then signed; two other signatories also signed separately in similar circumstances. So far then from supporting this argument there is clear and unchallenged evidence tending directly to negative the existence at the time of any mutual promises among the donors and the argument fails.

The next point was that, within a family, a compromise of doubtful rights is specifically enforceable under section 22 (c) of the Specific Relief (Malay States) Ordinance, 1950. This provision is founded on the doctrine of *Stapilton v. Stapilton*[2], where Lord Hardwicke made it clear that the consideration must be weighed as at the time when the agreement was made. If the family of Tan Soh Sim had been advised at the time that she was, or might be held to be, domiciled in China, then the adopted children would have had a genuine claim and the fact that this claim was subsequently negatived by the Court would not have been a ground for invalidating a compromise. But actually they were advised and believed that the adopted children had no legal right to share so there was no dispute to compromise and this case is not within the principle of equity or the terms of the section.

Then it was submitted that the instrument should operate as an equitable assignment of the shares of the signatories constituting the administrator of the estate, when appointed, a trustee of those shares for the donees. Such an assignment is not binding unless it is made for consideration; the consideration relied on was the alleged mutuality of promises among the signatories so this argument is subsidiary to the first one and fails for the same reason.

Lastly it was argued that the instrument could be regarded as a contract between the signatories and the donees; the learned trial Judge examined it at length from this point of view; he began by finding that the instrument was signed by the donees as well as by the donors. This was a mistake. The donees signed a copy later in connection with the subsequent ratifications but some of the signatories never purported to ratify and the primary question is as to the effect of the original instrument by itself, signed by one side only. Section 26 (a) of the Contract Ordinance, 1950, which is identical with section 25 (a) of the Enactment (Cap. 52) in force at the relevant date, provides that an agreement without valuable consideration shall be void unless it is expressed in writing and made for natural love and affection between near relations.

This raises two sets of questions. First as to form. Is the alleged agreement sufficiently "expressed in writing" to satisfy the section although it is signed by one side only and although love and affection are not mentioned in the document? Both points are arguable but they were not fully argued. For the purpose of this part of the judgment it is necessary to assume, but without deciding, that in point of form the writing was sufficient. Secondly, as to substance. What exactly is meant by "near relations"? Are adoptive relations included? How "near" must they be?

The learned trial Judge discussed this topic at length and examined a number of authorities. He came to the conclusion that the relationship must be one arising from, or depending on, status. This only shifts the difficulty without assisting to solve it. It is not easier to understand exactly what is meant by status, in this context, than to construe the bare words of the statute. Attention was drawn to the illustration which refers to a gift between father and son but there is only one illustration to this part of the section. Could the reference to a son, in the one illustration, mean that a grandson would be too remotely related? — or a wife? Clearly the section cannot be narrowed in that way. If a grandson and a wife are near enough, why should an adopted son be too remote?

It is impossible to define relationship or "nearness" without either extending or restricting the legislation which would be beyond the province of the Court. If the word "near" were omitted, then the most distant cousin would be an eligible relation and the clause would be unmanageable. The words "relationship" and "near" must be applied and interpreted in each case according to the mores of the group to which the parties belong and with regard to the circumstances of the family concerned.

This raises the general question of the effect of Chinese adoption and a more particular question as to the effect of the repeal of the Recognition of Chinese Laws Order in Council of 1893. The learned trial Judge was of opinion that the repeal of that

Order in Council swept away the whole of the law of China, except as to persons domiciled there, and made every local Chinese subject in his personal relations to "the local law." But there is no local law in the sense of a body of personal law applicable generally to people locally domiciled. Take, for example, one of the commonest questions arising in daily life — How is a marriage registered? It cannot be answered by reference to locality. No one can say, "In Perak, marriages are registered thus." There are different laws for different racial and religious groups.

The history of the matter can be stated briefly.

In 1875 there was no effective law in Perak; the country was in a state of disturbance and, literally, of anarchy. In the eighties almost everybody in the State, who was not a riverine kampong Malay, was an immigrant; almost every estate, therefore, was the estate of a person domiciled abroad and the Courts, applying the ordinary rule of the English conflict of laws, decided questions of succession to the estates of Chinese, Indians and Europeans, according to the laws and customs of their respective countries. As these immigrants became settled here the situation changed — at first imperceptibly. A deceased might be held to have acquired a domicil of choice in the State but local society was communal; he was still a member of a distinct community who retained and practised the religious and social customs of the district or group from which they came. There was no Malayan personal law and it would have been impossible to frame one. The situation was comparable to that in India where one and the same Court applied Hindu law to the estate of a Hindu and Mohammedan law to the estate of his next-door neighbour. In short, India and the Malay States dealt with local questions of personal law on the same fundamental principle as English Courts deal with the personal law of foreigners — that is, they applied the law of the community in every case.

There was no difficulty in principle but there was a constantly recurring difficulty in practice. It is feasible to ascertain the general principle of Chinese family custom, which are described by well-known writers and were then uniform throughout China, but when it comes to deciding a specific case — say of disputed succession — these general statements are often too vague and uncertain to furnish a *ratio decidendi,* and if a special or local variation is alleged it is impossible to find any authority on the point. Consequently, in 1893 the State legislature enacted an Order in Council formally giving recognition to Chinese Family Law and specifying its main provisions. In effect this was a codifying statute. The other States never codified but they followed the same principles.

Where groups of emigrants establish themselves abroad as a community they tend to retain and conserve their laws and customs more strictly than does the mother country. In Bali, ancient Hindu customs and ceremonies were crystallised and preserved for centuries during which the system changed almost out of recognition in India. The Parsees in Bombay have kept up a tradition which long ago disappeared in Persia and there are many other instances. On the other hand, an immigrant society in contact with other cultures may be absorbed and lose its identity; much depends on the degree to which relations with the homeland are maintained.

Some of the Chinese families who became settled in Malaya kept up the old traditions but the community was constantly augmented by new immigrants and, after the Chinese Revolution of 1910, more and more of these brought with them the ideas of modern China. A remarkable example of the conflict between the old and new views of family government is described by Terrell, J., in *Choi Wai Ying v. Cheong Weng Chan and others*[3].

In the case of a Chinese who was domiciled in China it became more difficult than ever to ascertain his personal law on any specific point because, while it could be said that the old customs were no longer strictly followed in China, the Revolution had not replaced them by any generally effective and certain body of personal law. Comparable, though less marked, scciological changes affected the various Indian communities.

By the year 1930 a much higher proportion of the non-Malay population had become domiciled in the Malay States and the practical difficulty of administering a variety of personal laws, especially in relation to intestate succession, had greatly increased. This and other causes led to the passing of the Distribution Enactment (Now, Cap. 71) which repealed the Recognition Order in Council and introduced the main provisions of the English Statute of Distribution, 22 & 23 Charles II, Cap. 10, to govern succession to the estate of every intestate (other than a Moslem) who died locally domiciled. This was not in any sense an attack on Chinese custom or on any other personal law. Testamentary freedom is absolute. The Chinese property-owning classes are accustomed to making wills and the practice is not uncommon among the Indian and other communities. They were all put on the same

basis and, granted a local domicil, there was no room for uncertainty. Everybody could give full effect by his will to his own personal views on family succession, customary or otherwise, and if he did not make a will, then the one statute applied irrespective of the community. But as regards other matters within the domain of the personal law, such as marriage, adoption and guardianship, the law of Perak reverted to the state in which it was before 1893 and the law of the other States remained in the same state as it had been in throughout — namely, that in the absence of any statutory provision, the Courts applied the personal law of the community concerned.

The learned trial Judge may have been misled by the word "Recognition" in the title of the Order in Council. He appears to have thought that Chinese Family Law was not recognised by the Courts before 1893, the recognition depended solely on the Order in Council, and consequently that after its repeal no part of that law could be recognised. This is not correct. As regards intestate succession — which is the matter of greatest concern — Chinese law was abolished but other parts of the personal law survive. This is clearly shewn by section 8 of the Distribution Enactment (Cap. 71) which, by express words, preserves the various personal laws which sanction polygamy.

A person who has been adopted according to Chinese custom therefore is a relation and the question whether he is a "near" relation within the scope of section 26 of the Contract Ordinance depends on the position of the other person in regard to whom the question arises. It can hardly be doubted that agreements between an adopted child and his adoptive parents or brothers would be supported on the ground of affection existing between them. But here the questions are whether the adopted children are nearly related, firstly, to the sisters and, secondly, to the uterine half-brothers and half-sisters of their adoptive mother.

Chinese custom is founded on patriarchal families and clans and the dominant motive for adoption of a son is to ensure that the family ancestor worship will be duly carried on. The sons in question were not adopted by Tan Soh Sim; they were adopted by Chan and bear his surname. If they were not Chans already they became Chans on adoption. Tan Soh Sim was their adoptive mother because she was Chan's wife. Boey Kee was their adoptive "second mother" because she was Chan's subsidiary wife; they were adopted into the family of which Chan was the head. Was he nearly related to his wife's sisters? Few Englishmen regard their sisters-in-law as near relations and fewer still receive from them substantial gifts; the relationship of an adopted son to his father's sister-in-law must be one degree more remote.

The Chinese, however, do not approach the matter in this way. They do not regard the family as a web of persons related to one another in different degrees of kindred and affinity. Their whole system is based on the notion that the family, not the individual, is the unit of consideration. A person is either a member of the family or outside it. When a girl is married she leaves her father's house and goes to reside in the house of her husband's father or grandfather. Her first ceremonial duty is to worship at the family shrine and her second is to kowtow to her husband's parents and elders; then his juniors in the family kowtow to her. All this is symbolic of the fact that she has been married into the family and is expected never to leave it. If her husband should die, however young, his brothers will still maintain her for the rest of her life, provided always that she remains in the family house; if she were permitted to remarry she would not be allowed to take her children with her; they belong to their father's family and must be brought up to worship his ancestors. If she leaves the family, she leaves it completely and they have no further responsibilities towards her.

It is true that the children of her two marriages may not inter-marry but they belong to different families and there is no relationship between them which could give rise to any legal or moral right to support or financial assistance. Our distinction between the full and the half blood does not arise in Chinese family law. All the sons of one man are equally brothers, just as the twelve sons of Jacob were equally brothers, though they had four different mothers.

The customs affecting property conform naturally to the family principle. All the sons inherit equally. The daughters do not inherit at all. A man is expected to provide presents and festal expenses on his daughter's marriage but nothing further. His duty is to provide for his daughters-in-law; they may bear grandsons to worship him; his own daughters cannot do so. To a Chinese man, a sister-in-law means a brother's wife, to whom he has responsibilities; his wife's sister is a person outside his family. To a Chinese woman, her husband's brother is a brother-in-law who has responsibilities towards her; her sister's husband is not. "In China", said Hare "there is no inheritance through a female." (Chinese Family Law, 1904). This is because relationship is not traced

through females, except for the limited purpose of considering eligibility for marriage. Hence there is no practical distinction between full sisters and uterine half-sisters, the latter being a rare phenomenon since both divorce and the remarriage of widows are discouraged.

In Chinese contemplation, therefore, the three Tan sisters and the seven Khoo half-brothers and sisters of Tan Soh Sim are related to the children of Chan, whether natural or adopted, only in a special and limited way which is not near. The position of Tan Boey Kee is slightly different because in her case no question of descent or adoption arises. The allegation on her behalf must be that a secondary wife is nearly related to the principal wife's sisters. From the Chinese point of view her relationship to them is certainly more remote than that of the children, if indeed any relationship exists.

The claims of all the donees must therefore be rejected not, as the trial Judge thought, because Chinese family custom is inapplicable but because according to that custom they are not nearly related.

In any event, there was no evidence of the existence of any natural love and affection between the parties to the alleged agreement. The evidence tended to prove that all the signatories had affection for Tan Soh Sim who had, during many years, shewn a warm and generous affection for them but it is not enough to shew that an agreement was made in deference to the wishes of a third person who was not a party to it. As the trial Judge held, the affection must be between the parties to the agreement. Where, as here, no consideration is stated in the document the onus of proving consideration, or facts which make it unnecessary, is on those who plead the validity of the transaction. If they rely on affection they must prove it and they must also prove the existence and degree of the relationship, where those are not apparent. Between parent and child, strong affection is so nearly universal that slight evidence of it will suffice; as the degree of relationship becomes more remote, more cogent evidence of affection will be required.

To summarise then, the intestate was domiciled in Perak; this disputed instrument was an unilateral undertaking to renounce by way of gift; it was not signed by the donees; it was not a mutual agreement between signatories; it was not an effective assignment binding the administrator; it was not an agreement between the signatories and the donees either by way of compromise of doubtful rights or for natural love and affection between them.

Chinese Family Law, though not unchanged, is still the personal law of locally-domiciled Chinese but it does not govern intestate succession for which other provision has been expressly made by statute; according to that personal law the signatories and the donees are not nearly related and natural love and affection are not shewn to have existed between them. The instrument is void at law and of no effect in equity.

At first sight one might be disposed to regret this result but it must be remembered that the fund in question is not the estate of Chan, from whom the donees had legitimate expectations and under whose will some of them will still benefit, but the separate estate of Tan Soh Sim. Ancient Chinese customs provided only marriage expenses for daughters and only maintenance for widows. A woman had no share in the estate either of her father or of her husband. Consequently few women ever left any separate estate and few understood business. Times change. Tan Soh Sim managed not only her own affairs but also those of the family. She maintained intimate relations with her half-sisters on her mother's side. She made many gifts to her sisters and nieces in life and it is not incongruous that they should benefit after her death. The only evidence that her wishes excluded them comes from one of the most interested parties. The circumstances of this family were wholly anomalous from the traditional Chinese point of view and it may be doubted whether the results of applying an alien law are really more unsuitable than the results of Chinese custom would have been.

However that may be, the learned trial Judge reached the right legal conclusion, though some of his reasons were incorrect, and his order must be affirmed except as to costs, on which point he may have taken too severe a view. He considered that the parties who claimed under the instrument were responsible for the litigation but this is only partly true. The administrator was the plaintiff. He took the view that he could not distribute the estate according to the instrument when its validity was disputed. This was not the correct approach. The administrator was sworn to distribute according to law. He could not, of course, ignore the instrument but it was open to him to work out a normal distribution and inform the claimants that, apart from agreement, he could not distribute otherwise, leaving them to take whatever steps they thought fit. Instead of this he took the less correct course of bringing the whole dispute to Court and himself expounding it. The claimants therefore did not actually initiate the litigation, though undoubtedly their actions led to it. In these special circumstances

the costs of all parties, up to and including the order of 19th April, 1950, may be taxed as between solicitor and client and paid out of the estate. The appellants must pay the costs of the appeal.

Abbott, J. : —I have had the advantage of reading the judgments of my learned brethren and, while I agree with the eventual conclusions of both — that the appeal be dismissed — I find myself wholly in agreement with the reasons given in the judgment of Taylor, J.

I agree that the costs of all parties, up to and including the order of the 19th of April 1950, may be taxed as between Solicitor and Client and paid from the estate — and that the costs of this appeal be borne by the appellants.

Briggs, J. : — I have had the advantage of reading the judgment of the learned President. I agree with both his reasoning and his conclusions and there are only two points, which seem to me of great general importance, on which I wish to add a few words.

The learned trial Judge held in effect that after the coming into force of the F.M.S. Distribution Enactment, 1929, Chinese Family law had no further application to a Chinese domiciled in Perak. Quoting *King v. Godwin* [4], he rightly held that the effect of the repeal of the Perak Recognition of Chinese Laws Order in Council, 1893, by that Enactment was "to obliterate it as completely . . . as if it had never existed." But a few lines earlier in his judgment he had said, "It is unnecessary to speculate as to what the position" (*i.e.* with regard to recognition and application of Chinese Family law) "was prior to 1893 . . ." Restated in this order, I think that this part of the learned trial Judge's judgment is seen to be erroneous. It was essential to consider what was the position prior to 1893, since in 1930 that position was, except as to intestate succession, restored. If prior to 1893 Chinese Family law was applied in certain cases, then after 1930 it must be similarly applied. I agree entirely with the learned President in all he has said on this question. After the 1st January, 1930, the Chinese law of intestate succession had gone, but other parts of Chinese Family law were recognized and applied in the same way as they had been prior to 1893. For the purposes of this appeal the relevant part of that law is the custom of adoption, which is still recognized as part of the personal law governing Chinese domiciled in Perak, and must, I think, continue to be so recognized, unless and until Chinese religious views are so changed that an omission to perform the ceremonies of ancestor-worship would no longer appear important.

The other point to which I wish to refer is the question whether the document in issue in this appeal was a contract. This depends on the effect of sections 2 and 26 of the Contract Ordinance, 1950. It is essential to remember that in the Contract Ordinance, 1950, as in its predecessors, various terms commonly used in English law have, by definition, meanings which are not precisely such as, from preconceived ideas based on English law, one would expect them to bear. Among such terms are "proposal", "promise", "agreement", "contract" and "consideration". In the remarks which follow I use these terms strictly in their statutorily defined senses. There must indeed be mutuality to constitute an agreement, since an agreement requires a promise, and a proposal does not become a promise until the person to whom the proposal is made signifies his assent thereto. In other words, there must be an acceptance in order to produce a promise; but one promise alone constitutes a unilateral agreement. That agreement may or may not be enforceable. If it is not, it is void; if it is, it is a contract. In this case I think the beneficiaries under the document communicated their acceptance of the proposals contained in the document by promptly attempting to enforce it. This was, I think, sufficient to convert the proposals into promises and the document into an agreement. It would therefore be a contract, if it fulfilled the requirements of paragraph (a) of section 26. The first of those requirements is that it should be "expressed in writing." I see no reason for saying that it is not so expressed. Formalism is contrary to the spirit of the Ordinance. The section does not say that the agreement, which is unilateral, must be executed by the intended beneficiary, and it does not say that the existence of love and affection must be mentioned. Illustration (b) to the section does not lend any colour to either suggestion. I think the agreement was "expressed in writing" within the meaning of the section.

The other requirement of section 26 is that the agreement should have been made "on account of natural love and affection between parties standing in a near relation to each other." In the phrase "natural love and affection" I think full effect must be given to the word "natural", and that it means not only "reasonably to be expected", but "reasonably to be expected, having regard to the normal emotional feelings of human beings." This immediately establishes the connection of these words with the later phrase "standing in a near relation." That phrase indicates,

in my opinion, that the "emotional feelings" required are of a special type, that is to say, they are such feelings as may ordinarily be expected to spring from the fact of the "near relation." If either the feelings or the relation are lacking, the section does not apply. In this case I think both were lacking. There is no express evidence that any love or affection existed in fact between the parties in this case and there are no circumstances from which one is obliged, or even entitled, to infer it. The abandonment by the legal next-of-kin of their claims in favour of persons who may have had a better moral right to inherit points only to a sense of duty, not necessarily to any love or affection. If love and affection were stated in the document to exist, an estoppel might in certain circumstances arise. In the case of parent and child there is, no doubt, a strong presumption that love and affection exist. Indeed, in that case, the presumption may be sufficiently strong to afford proof, within the meaning of the Evidence Ordinance, without any actual evidence. But if the relation is less near, the presumption diminishes with the nearness, and rapidly becomes too weak to act upon, in the absence of express evidence. If the evidence of love and affection were strong, I personally should wish to take a liberal view on the question what type of relation could in law be near, and I think it not impossible that, (apart from any differences arising from different personal laws) the answer to that question might be affected by the circumstances of the individual case. For example, if an orphan were brought up by comparatively remote relations, who were nevertheless his nearest, I think the Court might hold them to be "near" in the special circumstances, though ordinarily they would not be "near." I am disposed, therefore, to think that there may be a sort of sliding scale by which love and affection, proved or presumed, and relative nearness of relation may interact on one another, and that, although some relations are obviously near, it would be unwise to say generally that any specific relation must be too remote. In this case, however, I am satisfied that no special circumstances exist which might weigh in favour of nearness, and hold that the relation was too remote on the grounds which the learned President has given. It must be remembered that the document on its face is void for want of consideration. The onus of showing that there was consideration, or that circumstances existed which rendered consideration unnecessary, was on the parties seeking to establish the document's validity. They have failed to do so. I hold that the document is not a contract.

I agree that the appeal should be dismissed, and I agree with the order proposed by the learned President on the question of costs, both here and below. The distinction between a stranger to an estate, claiming adversely to the apparent beneficiaries and instituting proceedings for the purpose, and a similar claimant brought in as a respondent in domestic proceedings by the administrator, is one of substance, not merely of form. The adopted children and Tan Boey Kee should not have been deprived of their costs in the Court below. The position might have been different if there had been an order for trial of an issue.

Appeal dismissed.

PUBLIC PROSECUTOR
v.
LOOI YEW CHUN AND TWO OTHERS

[App. Crim. Juris. (Thomson, J.) February 22, 1951]

[Ipoh — Criminal Appeal No. 8 of 1951]

Customs Enactment, s. 144(i)(h) — Fraudulent evasion of customs duty — Burden of proof on the prosecution — Conviction by the High Court under different section.

In this case the three accused were all charged under section 114(i)(h) of the Customs Enactment for being knowingly concerned in a fraudulent attempt at evasion of Customs Import Duty amounting to $124.12. The evidence for the prosecution was that the first defendant as the accredited agent of Lai Wah & Co., Ipoh, on 26th May, 1950, made an application to the Customs Office, Ipoh, to import a case of textiles and declared the cost at $1.85 per yard. He also produced in support of the application an invoice in Chinese from Lee Say & Co., Singapore which mentioned the price of the cloth as $1.85 per yard. The Customs Officer doubted the value declared by the importer and referred the matter to the Technical Adviser on Piece Goods, Federation of Malaya who assessed the cloth at $3.15 per yard. The prosecution also disclosed that the same case together with two others were ordered by the second defendant on behalf of Lai Wah & Co. in December 1949 from the firm of 'Societa' Singapore. An agreement for the said order was signed by the second defendant and the firm's agent at Kuala Lumpur. According to the agreement the cases were to be delivered at Singapore Railway Station and the cost was $3.70 per yard. The goods arrived from Italy round about March 1950. Some time before the arrival of the goods the second defendant directed the 'Societa' agent to deliver them to Lee Say & Co. on arrival, that is, in March 1950 and were paid for by the defendant firm (Lai Wah & Co.) about two months later. The prosecution also disclosed that Lee Say & Co., Singapore, were shareholders of Lai Wah & Co., Ipoh and also directors of the latter company.

The first defendant said in his defence that he was handed the invoice by the second defendant on 26th May, 1950, and asked to take delivery of the goods. He did as instructed. He did not know about the contract nor if the value stated in the invoice was false or not. There was no evidence against the first defendant that he was privy to the attempt at evasion of the customs duty, and the learned Magistrate acquitted him.